Office of Chief Counsel Internal Revenue Service

memorandum CC: TL-N-5533-00

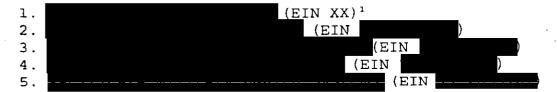
date:

ω.	Attention: District
	, Group Manager, Employment Tax , Employment Tax Specialist
from:	, Associate Area Counsel, LMSB , Attorney
subject:	Request for Pre-Review of Non-docketed Significant Advice
	Taxpayers: (1) (EIN XX)
	(2)
	(3) (EIN
	(4) (EIN)
	(5) (EIN LEIN LEIN LEIN LEIN LEIN LEIN LEIN L
	Issue: Statute Extensions for Employment Taxes for years <u>prior</u> to
	Statute of Limitations.

THIS ADVICE CONSTITUTES RETURN INFORMATION SUBJECT TO I.R.C. § 6103. THIS ADVICE CONTAINS CONFIDENTIAL INFORMATION SUBJECT TO ATTORNEY-CLIENT AND DELIBERATIVE PROCESS PRIVILEGES AND IF PREPARED IN CONTEMPLATION OF LITIGATION, SUBJECT TO THE ATTORNEY WORK PRODUCT PRIVILEGE. ACCORDINGLY, THE EXAMINATION OR APPEALS RECIPIENT OF THIS DOCUMENT MAY PROVIDE IT ONLY TO THOSE PERSONS WHOSE OFFICIAL TAX ADMINISTRATION DUTIES WITH RESPECT TO THIS CASE REQUIRE SUCH DISCLOSURE. IN NO EVENT MAY THIS DOCUMENT BE PROVIDED TO EXAMINATION, APPEALS, OR OTHER PERSONS BEYOND THOSE SPECIFICALLY INDICATED IN THIS STATEMENT. THIS ADVICE MAY NOT BE DISCLOSED TO TAXPAYERS OR THEIR REPRESENTATIVES.

THIS ADVICE IS NOT BINDING ON EXAMINATION OR APPEALS AND IS NOT A FINAL CASE DETERMINATION. SUCH ADVICE IS ADVISORY AND DOES NOT RESOLVE SERVICE POSITION ON AN ISSUE OR PROVIDE THE BASIS FOR CLOSING A CASE. THE DETERMINATION OF THE SERVICE IN THE CASE IS TO BE MADE THROUGH THE EXERCISE OF THE INDEPENDENT JUDGMENT OF THE OFFICE WITH JURISDICTION OVER THE CASE.

The purpose of this memorandum is to supplement our advice dated December 5, 2000, in light of the fact that Exam has decided to secure individual Forms SS-10, "Consent to Extend the Time to Assess Employment Taxes," from certain subsidiaries, including the following five subsidiaries:

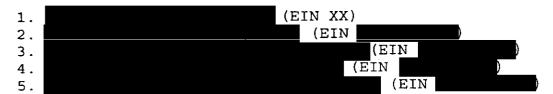


Given the imminent expiration of the statute of limitations, we have assumed in rendering this memorandum that the statute of limitations for the assessment of employment taxes with respect to the foregoing entities has been validly extended through.

Furthermore, our advice herein is applicable for tax years prior to (but not including) the year.

ISSUES

For each of the following entities, (a) how should the entity's name be captioned on the Form SS-10, and (b) whether a transferee consent should be obtained from the corporation into which the entity was merged:



CONCLUSIONS

a. Captions on Form SS-10

(EIN XX)

	Sinc	e the	ce a:	re confi	lictin	g f	acts	as	to	whe	ther			
				(whice	ch 💮						W	as	mer	ged
with	and	into)	was	merged										
				("	Τ),	we	recor	nmer	ıd y	/ou	obtai	n <u>1</u>	<u>cwo</u>	Forms

On a listing that you have provided and the Current is shown as EIN

However, this may be an error, as an INOLE (a copy of which is affixed hereto as Exhibit A) shows

EIN as

SS-10 (for relevant years prior to), captioned as follows:	
i. (EIN (EIN (EIN: (EIN:	
(EIN:) (formerly known as successor in interest to XX).	
2. (EIN)	
The Form SS-10 (for relevant periods prior to be captioned as follows:	
successor in interest to (EIN:), as	
3. (EIN)	
Since there are conflicting facts as to whether (which) was merged with and into) was merged into ("""), we recommend you obtain two Forms SS-10 (for relevant years prior to to the control of the control of two captioned as follows:	I
i.) (formerly known as (EIN) (somerly known as (EIN:) (somerly known as (EIN:) as	
successor in interest to	•
2 If you know that was formerly known as , you can modify all applicable parentheticals to read: (formerly known as and	
•	

^{3 &}lt;u>See supra</u> note 2.

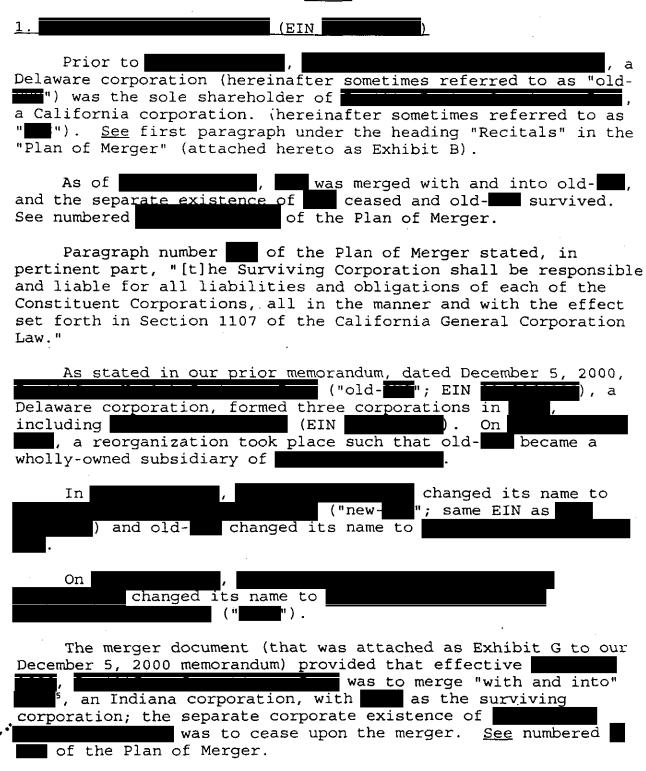
(EIN); and	
ii. (EIN:) (formerly known as successor in interest to (EIN)	, as
4. (EIN)	
The Form SS-10 (for relevant periods prior to be captioned as follows:	should
successor in interest to (EIN:), as	
5. (EIN)	
Since there are conflicting facts as to whether (which) was merged with and into) was merged into ("""), we recommend obtain two Forms SS-10 (for relevant years prior to captioned as follows:	you),
i. (formerly known as (a) (formerly known as (EIN: (formerly known as successor in interest to (EIN: (EIN:	in , as
(formerly known as as successor in interest to (EIN:	,

b. Transferee Consents

Transferee consents need not be obtained because under the laws of the states governing each merger and subsequent mergers of the surviving corporations, the transferees would be liable for the transferor's liabilities.

⁴See <u>supra</u> note 2.

FACTS



became a wholly-owned first tier holding company of new-

Paragraph numbered of the Plan of Merger stated in part, "[shall assume and be responsible and liable for all liabilities and obligations of [sas required by Indiana law."

Article of the Plan of Merger states that it was to be

governed by the laws of the State of Indiana.

As indicated in our memorandum dated December ______, 2000, we are unable to determine from the various IDRS transcripts, dated _______, whether _______ did, in fact, merge out of existence, since: (1) an INOLEX transcript for _______ 's EIN shows a cross-reference to EIN ________, which belongs to new-______; (2) conversely, an INOLES transcript for new-______ cross-references _______ 'EIN with a code "SB," which we presume means "subsidiary;" and (3) further, a LEXIS record shows the corporate status of _______ as "surrendered," not "merged out," and in fact, the LEXIS record for _______ does not mention a merger. Thus, it is unclear whether

was merged out of existence as provided for in

2.

the merger documents.

Copies of an ENMOD and a LEXIS printout affixed hereto as Exhibits D and E, respectively do not reflect any changes to the name of (EIN: (EIN:). In addition, a representative of new- has indicated that has not undergone any reorganizations, dissolutions, etc.

Ownership, merging "____

Delaware corporation into "

3. (EIN: 6
Effective , in accordance with 8 Del. Code § 253, (EIN:) was merged into its parent, which owned % of its stock. Affixed hereto as Exhibit G are copies of the following documents related to the merger: a "Certificate of Ownership and Merger" and an "Agreement of Merger."
Paragraph of the "Agreement of Merger" states "[t]he Surviving Corporation shall be responsible and liable for all liabilities and obligations of each of the Constituent Corporations, all in the manner and with the effect set forth in Section 259 of the General Corporation Law of the State of Delaware."
4. (EIN)
Affixed hereto as Exhibit H is a copy of Certified Articles of Merger for and merged with and into its sole shareholder, Paragraph of the "Agreement of Merger," which is affixed as an exhibit to the Articles of Merger, states, in pertinent part, "[t]he Surviving Corporation shall be responsible and liable for all liabilities and obligations of each of the Constituent Corporations, all in the manner and with the effect set forth in Article 5.06(A)(2) of the Business Corporation Act of the State of Texas."
Copies of an ENMOD and LEXIS printout affixed hereto as Exhibits I and J, respectively do not reflect any changes to the name of (EIN:), and a representative of new- has indicated that has not undergone any reorganizations, dissolutions, etc.
5. (EIN

Affixed hereto as Exhibit K is a copy of Certificate of

This corporation is shown on listings you have provided us and the rider affixed to the Current Consent as "..." However, according to the INOLES and LEXIS printouts affixed hereto as Exhbit F and the merger documents referred to below, the entity's name was "..."

Effective , merged with and into its sole shareholder,

Paragraph of the Agreement of Merger, which is affixed as an Exhibit to the Certificate of Ownership, states, in pertinent part, "[t]he Surviving Corporation shall be responsible and liable for all liabilities and obligations of each of the Constituent Corporations, all in the manner and with the effect set forth in Section 259 of the General Corporation Law of the State of Delaware."

DISCUSSION

I. <u>Generally</u>

As we noted in our prior memorandum, dated December 5, 2000, when state law so provides, the successor in interest is primarily liable for the debts and obligations of the absorbed corporation. Phillips v. Lyman H. Howe Films Co., 33 F.2d 891, 892 (3d Cir. 1929).

The party that is liable for the debts of the merged corporation is the one that must sign the waiver of the statute of limitations on behalf of the merged corporation. See Gott v. Live Poultry Transit Co., 17 Del. Ch. 288, 153 Atl. 801 (1931). When state law provides for primary liability of a surviving corporation after a statutory merger, the surviving corporation should sign the consent to extend the statute of limitations as "surviving corporation, successor in interest to predecessor corporation." Primary Liability and Transferee Liability of Successor Corporation, G.C.M. 34,970, I-4092 (July 31, 1972).

With respect to transferee liability, as we noted in our prior memorandum, dated December 8, 2000, the Service will attempt to assert that a successor is a transferee, as a last resort, when the statute of limitations under I.R.C. § 6501 has expired but the statute of limitations under I.R.C. § 6901 is still open. See GCM 34,970, at page 18, and CCDM 35.10.6.1 ("should the issuance of a new statutory notice be barred by the statute of limitations, it is advisable that the case be processed and handled as a transferee case").

Section 6901 does not create or define the existence of a transferee's liability, but affords the Commissioner a procedural remedy for collection of tax. Adams v. Commissioner, 70 T.C. 373 (1978), aff'd in part without published opinion and dismissed in part, 688 F.2d 815 (2d Cir. 1982); and Gumm v. Commissioner, 93 T.C. 475, 479 (1989). Under I.R.C. § 6901(a)(2), assertion of transferee liability for employment taxes is allowed if the

transferee liability arose on the liquidation of a partnership or corporation, or on a reorganization within the meaning of I.R.C. § 368(a).

II. Application of the Law

1. (EIN XX)

1. Forms SS-10

The Plan of Merger, by which was merged into (formerly known as) (EIN:), provided that the agreement was to be governed by the laws of the State of California, and that the surviving corporation would be responsible and liable for all liabilities and obligations of the constituent corporations.

California law provides:

Upon merger pursuant to this chapter the separate existence of the disappearing corporations ceases and the surviving corporation shall succeed, without other transfer, to all the rights and property of each of the disappearing corporations and shall be subject to all the debts and liabilities of each in the same manner as if the surviving corporation had itself incurred them.

CAL. CORP. CODE § 1107(a) (Deering 2000).

Here, according to California law and the terms of the merger agreement, old- became primarily liable, as a successor in interest, for the employment taxes of

The merger agreement, by which was purportedly merged into , provides that the merger is to be governed by the laws of the State of Indiana, and that the surviving corporation (i.e.,) would assume or succeed to the liabilities of the merged corporations.

According to Indiana law and the terms of the merger agreement pursuant to which old-was purportedly merged into would be primarily liable, as a successor in interest,

IND. CODE ANN. § 2-1-40-6(a)(3) (Burns 2000) provides that "[w]hen a merger takes effect . . . [t]he surviving corporation has all liabilities of each corporation party to the merger . . . "

for the liabilities of old-

Since there are conflicting facts as to whether old-was merged into was, we recommend you obtain two Forms SS-10 (for relevant years prior to was), captioned as set forth under the heading CONCLUSIONS.

Since both California law and Indiana law impose primary liability on a surviving corporation in a merger for the debts of the merged entity, you need not procure a transferee consent form with respect to solutions.

2. (EIN)

1. <u>Form SS-10</u>

The Consent, by which the Board of Directors of resolved that be merged into does not have a "choice of law" provision specifying the state law to be used in governing or construing it. However, in the Consent, be merged with and into pursuant to Title 18, Section 1083 of the Okalahoma Statutes and that as the surviving entity, assume any and all of s liabilities and obligations. Given the merger was effected pursuant to a provision of the Oklahoma statutes and the merger involved Oklahoma corporations, Oklahoma law should be applied.

Title 18, Section 1088 of the Oklahoma Statutes provides, in pertinent part, as follows:

When any merger or consolidation shall have become effective pursuant to the provisions of the Oklahoma General Corporation Act . . . rights of creditors and all liens upon any property of any of said constituent corporations shall be preserved unimpaired, and all debts, liabilities and duties of the respective constituent corporations, from that time forward, shall attach to said surviving or resulting corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.

Here, according to Oklahoma law and the Board's resolution, is primarily liable, as a successor in interest, for the employment taxes of you should secure a Form SS-10 from

with respect to the employment tax liabilities of

2. Form 4016

We do not know if there is an Agreement of Merger with respect to smerger into has only provided the Consent of 's Board with respect to this merger, in which it is stated that the Board directs as a surviving corporation in the merger, to assume any and all of 's liabilities. Thus, in this situation, we have no evidence that is a transferee at law with respect to semployment tax liabilities by virtue of contractual liability.

In any event, since is liable as a successor in interest under Oklahoma state law for semployment tax liabilities, a transferee form is not required. Thus, we do not recommend that you secure a Form 4016 from for the employment tax liabilities of .

3. (EIN)

The merger agreement by which was merged into old-provides that the agreement was to be governed by the laws of the State of Delaware and that old-will be liable for the all liabilities and obligations of each constituent corporation pursuant to section 259 of the General Corporation Law of the State of Delaware.

8 Del. Code § 259 provides, in pertinent part, that when any merger shall have become effective:

[A] Il rights of creditors and all liens upon any property of any of said constituent corporations shall be preserved unimpaired, and all debts, liabilities and duties of the respective constituent corporations shall thenceforth attach to said surviving or resulting corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.

According to Delaware law and the terms of the merger agreement pursuant to which purportedly merged into old-law, old-law became primarily liable, as a successor in interest, for the liabilities of

Since there are conflicting facts as to whether old-was merged into we recommend you obtain two Forms SS-10 (for relevant years prior to we heading CONCLUSIONS.

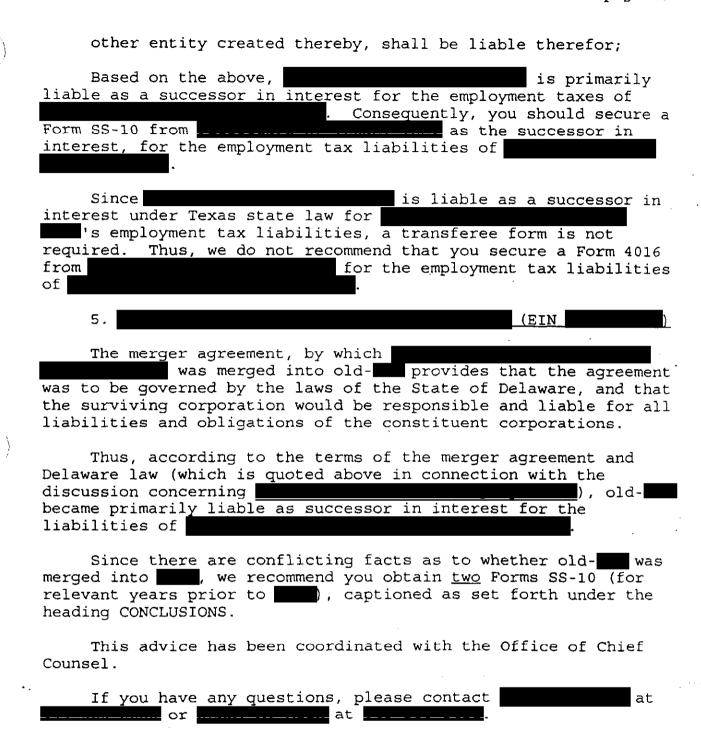
Since both Delaware law and Indiana law impose primary liability on a surviving corporation in a merger for the debts of the merged entity, you need not procure a transferee consent form with respect to solution 's liabilities.

4. (EIN)

The merger agreement by which was merged into provides that the merger was to be governed by the laws of the State of Texas and that the surviving entity would be responsible and liable for all liabilities and obligations of each constituent corporation, all in the manner and with the effect set forth in Article 5.06(A)(2) of the Business Corporation Act of the State of Texas.

Article 5.06(a) of the Business Corporation Act of the State of Texas states, in pertinent part, when a merger takes effect:

- (2) all rights, title and interests to all real estate and other property owned by each domestic or foreign corporation and by each other entity that is a party to the merger shall be allocated to and vested in one or more of the surviving or new domestic or foreign corporations and other entities as provided in the plan of merger without reversion or impairment, without further act or deed, and without any transfer or assignment having occurred, but subject to any existing liens or other encumbrances thereon;
- (3) all liabilities and obligations of each domestic or foreign corporation and other entity that is a party to the merger shall be allocated to one or more of the surviving or new domestic or foreign corporations and other entities in the manner set forth in the plan of merger, and each surviving or new domestic or foreign corporation, and each surviving or new other entity to which a liability or obligation shall have been allocated pursuant to the plan of merger, shall be the primary obligor therefor and, except as otherwise set forth in the plan of merger or as otherwise provided by law or contract, no other party to the merger, other than a surviving domestic or foreign corporation or other entity liable thereon at the time of the merger and no other new domestic or foreign corporation or



Attachments: As stated